



The State of New Hampshire  
*Department of Environmental Services*  
**Water Council**

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**STATE OF NEW HAMPSHIRE**  
**WATER COUNCIL**

**Decision & Order**  
**Declining to Accept Appeal**

**Docket No. 04-15 WC**

Appeal of the Town of Nottingham Selectmen

On July 30, 2004, The Town of Nottingham Selectmen ("the Town") filed this Notice of Appeal. The Notice of Appeal appealed the July 1, 2004 Large Groundwater Permit Approval to USA Springs, Inc. ("USA Springs") (LGWP 2004-0003). The Department of Environmental Services ("DES") filed a Motion to Dismiss Appeal on August 4, 2004. The Town filed an Objection to the DES Motion to Dismiss on August 6, 2004. USA Springs filed a Motion to Dismiss on August 9, 2004.

**FACTS**

The Town argues that the appropriate avenue of appeal under RSA 485-C:21, VI is to the Water Council, in accordance with RSA 541-A. DES argues that the appropriate avenue of appeal under RSA 485-C:21, VI is for the Town to file a motion for rehearing and then an appeal to the New Hampshire Supreme Court in accordance with RSA 541:6.

**APPLICABLE LAW**

RSA 485-C codifies the statutory authority for DES to issue large groundwater withdrawal permits. RSA 485-C:21, VI states:

Rehearings and appeals from a decision of the department under this section shall be in accordance with RSA 541.

RSA 541:3 requires an aggrieved party to file a motion for rehearing. And, then provides for an appeal to the New Hampshire Supreme Court under RSA 541:6.

Appeals to the Water Council from DES' decisions are pursuant to RSA 21-O. RSA 21-O:7 states:

The water council shall hear and decide all appeals from department decisions relative to the functions and responsibilities of the division of water other than department decisions made under RSA 482-A relative to wetlands, in accordance with RSA 21-O:14.

RSA 21-O:14 provides that hearings before the Water Council shall be conducted in accordance with RSA 541-A and that appeals from its decisions are in accordance with RSA 541.

## **DECISION**

### **A. Appropriate Appeal Route For A Large Groundwater Withdrawal Permit Is To The New Hampshire Supreme Court.**

The Council determines that an appeal from the approval or denial of a large groundwater permit is pursuant to RSA 541 through a motion for rehearing to DES and then an appeal to the New Hampshire Supreme Court.

The Supreme Court is the final arbiter of the intent of the Legislature as expressed in the words of the statute considered as a whole. *Sweeney v. Ragged Mt. Ski Area*, 151 NH \_\_\_, \_\_\_, 855 A.2d 427, 429 (2004). In interpreting a statute, the Supreme Court first examines the language of the statute, and, where possible, ascribes the plain and ordinary meanings to the words used.

*Id.* When the language of a statute is plain and unambiguous, the Supreme Court does not look beyond it for further indication of legislative intent. *Id.*

RSA 485-C:21, VI, which codifies the statutory authority for DES to issue large groundwater withdrawal permits, states:

Rehearings and appeals from a decision of the department under this section shall be in accordance with RSA 541.

RSA 541:3 requires an aggrieved party to file a motion for rehearing. And, then provides for an appeal to the New Hampshire Supreme Court under RSA 541:6.

This interpretation of RSA 485-C:21, VI position is also supported by an Opinion of the Attorney General issued on September 2, 2004 to Commissioner Michael P. Nolin regarding the interpretation of the Shoreland Protection Act (RSA 483-B). In that Opinion, the Attorney General determined that “any administrative appeal of a permitting decision is governed by the procedure specified in the statute under which the underlying permit was granted.” *Opinion of the Attorney General*, at 4. The Opinion also states that “[w]here the agency is undertaking enforcement action under the [Shoreland Protection] Act itself, appeal would be to the Water Council for administrative order, and to the New Hampshire Supreme Court under RSA ch. 541 for administrative fines.” *Id.* citing to RSA 483-B:5, V.

RSA 483-B:18, III (c) states:

Rehearings and appeals relating to such fines shall be governed by RSA 541.

This language is the same as the language in RSA 485-C:21, VI.

As result of the Opinion of the Attorney General and the principles of interpreting statutes, the Council determines that the Town’s appeal of DES’ decision to approve the large groundwater

withdrawal permit for USA Springs should have been to the New Hampshire Supreme Court and not to the Council.

**B. During A Public Meeting Of The Council, Councilor James Varotsis Appropriately Raised Information That Had Been Mailed To Him.**

At the September 8, 2004 public meeting of the Council, Councilor James Varotsis raised the issue that he had received information that he felt related to this Notice of Appeal in his personal mail. He questioned who had sent the document to him and then he explained to the Council generally what the document was. Councilor Varotsis clearly explained that he had not solicited this information and that he did not know who had sent it to him. Chairman John Bridges entered the document into the official record of this case.

In a letter dated October 1, 2004, USA Springs moved to have Councilor Varotsis recused from this case alleging that he had received *ex parte* evidence and was possibly biased based on the comments Councilor Varotsis made at the September 8, 2004 meeting. At the October 13, 2004 meeting of the Council, the Council considered USA Springs' request that Councilor Varotsis recuse himself and voted to deny the request.

The Council determines that its members should not review any *ex parte* information received by them once they are aware that it is *ex parte* information and further determines that its members should bring to its attention during a public meeting the fact that *ex parte* information has been sent to a Council member. Sending Councilors *ex parte* information will not be allowed as a way to disqualifying Councilors. If the Council knows, or has reason to believe it knows, the identity of any person or entity who sends *ex parte* information to a Councilor, it will report such person or entity to the Attorney General's Office for further action.

In this case, the Council finds that Councilor Varotsis' impartiality is not affected by the documents that he received relating to this case and that he will continue to act impartially and fairly in this matter.

**Order**

Accordingly, the Council **DECLINES TO ACCEPT THE NOTICE OF APPEAL** for the reasons stated above.

**Reconsideration**

Pursuant to Env-WC 203.29(a), any person whose rights might be directly affected by this decision may file a motion for rehearing within 30 days of the date of this decision. The motion must contain the information specified in Env-WC 203.29(b). Copies of any motion for rehearing shall also be sent or delivered to all other parties of record. Pursuant to Env-WC 203.29(e), this decision shall become final if no motion for rehearing is filed within 30 days.

So Ordered for the Council by: \_\_\_\_\_

**COPY**

January 13, 2005

Michael Sclafani, Appeals Clerk